IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1241

DAVID KRAMER,

Petitioner,

vs.

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (ALUMINUM) AWNINGS CO., a corporation, and SEARS ROEBUCK AND CO., a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION TWO

MEMORANDUM OF RESPONDENT IN OPPOSITION

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MEMORANDUM OF RESPONDENT IN OPPOSITION

Respondent sets forth herein its opposition to granting a writ of certiorari in memorandum form for the reason that it is unable to relate the

subject matter set forth in the petition to the headings used by petitioner therein.

Petitioner apparently seeks review of an Order Dismissing Appeal of the Court of Appeal of the State of California, Second Appellate District, Division Two, filed by said court on August 27, 1970, as corrected by further order filed August 28, 1970. These orders are not reported in any published report. Petitioner has reproduced said orders as Exhibit M to his petition herein, but has erroneously referred to them in his preliminary paragraph on page 1 of his petition as Exhibit A. Copies of said orders are appended to this response in the Appendix at pages A-1 through A-3 and page B-1.

LACK OF JURISDICTION

Petitioner invokes the jurisdiction of this court "under 28 U.S.C. 1257" (Petition, page 2, last line of first paragraph). Since review of a final decree of a state court is apparently being sought by writ of certiorari, only subsection (3) of said Section 1257 is possibly applicable. Nowhere in the petition is it alleged, however, that any of the statutory criteria set forth in said subsection (3) of said Section 1257 are present in this case.

The petition contains no allegation or suggestion that a treaty or statute of the United States is involved in any way, much less that the validity of such a treaty or statute has been drawn in question.

The petition contains no allegation or suggestion that the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The most that can be gleaned from a reading of petitioner's statement of the case is that he disagrees with the application of certain California Rules of Court to the steps taken by him in attempting to perfect an appeal through the California courts (Petition, page 5, paragraph IX and page 8, paragraph II). In so doing, he does not question the validity of any such rule or of any statute upon which the rule is based. To the contrary, he necessarily asserts the validity of such rules, seeking only that they be applied differently than they were to reach the present result. To the extent that a State statute might be involved, the only reference to any such statute is found in the decision of the California Court of Appeal set out in the Appendix hereto at pages A-1 through A-3. The California Court therein discusses the operation and application of Section 631.8 of the California Code of Civil Procedure; but nowhere does petitioner question the validity of that statute or its application. In point of fact the statute is not mentioned at all in the body of the petition on file herein.

The petition contains no allegation or suggestion that any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the Unted States.

Taken as a whole, the petition herein makes no affirmative showing that a federal question was presented for decision to the

highest court of the State having jurisdiction, that its decision of the federal question was necessary to the determination of the cause, that the federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. On this state of the record, the Supreme Court has no jurisdiction to review a state court deicision. [Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U.S. 206, 82 L. Ed. 751, 58 S. Ct. 528; Wilson v. Cook, 327 U.S. 474, 90 L. Ed. 793, 66 S. Ct. 663.]

LACK OF SPECIAL OR IMPORTANT REASONS

The petition herein does not set forth directly or by any fair inference from its allegations any special or important reason why appellate jurisdiction of the United States Supreme Court should be invoked by review on writ of certiorari. This is not a matter of right, but of sound judicial discretion. [Fay v. Noia, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822]

The case at bar does not in any way involve a decision of a Court of Appeals such as might be considered under Rule 19 (b) of the Supreme Court Rules.

Nor does the petition allege or suggest that a federal question of substance not theretofore determined by the United States Supreme Court was decided by a state court in this case, or that such a decision by a state court was made in a way probably not in accord with applicable decisions of the United States Supreme Court. [Rule 19 (a) Supreme Court Rules.].

Upon application to the United States Supreme Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that the Supreme Court has jurisdiction. [Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962.] As the record fails to disclose any federal question having been decided in any way by a state court, the Supreme Court is without jurisdiction in this matter and the writ should not be granted. In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L. Ed 712, 714, 43 S. Ct. 422.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOWNEY A. GROSENBAUGH

Counsel for Respondent,
Better Business Bureau
of Los Angeles, Ltd.

Of Counsel,

ROBERT A. KELLER

APPENDIX A

[Opinion of the Court of Appeal, Second Appellate District, State of California, Division Two, Filed August 27, 1970, Clay Robbins, Jr., Clerk]

2nd Civil No. 36226

DAVID KRAMER and STANFORD H. BERMAN, Plaintiffs and Appellants, v. BETTER BUSINESS BUREAU OF LOS ANGELES LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	ORDER DISMISSING APPEAL

THE COURT:

Respondent moves to strike a point on appeal and dismiss appeal as to said point. This motion is directed to Point (1) of the Notice of Appeal.

This appeal is from a judgment for defendant entered pursuant to a motion under section 631.8 of the Code of Civil Procedure.

The Amended Notice of Appeal states "The appeal is based on two points":

"(1) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case;

"(2) That Section 631.8 was inapplicable and beyond the right of the trial court to consier because defendants had already introduced evidence on their behalf."

Appellant has provided a partial reporter's transcript. It is apparent that the appellant has misconceived the law concerning appellate review of a judgment under section 631.8 of the Code of Civil Procedure. The test is the same as a review of any other findings of a trial court. That is, is there substantial evidence in the record to support the trial court findings? (Greening v. General Air-Conditioning Corp., 233 Cal. App. 2d 515; Charles C. Chapman Building Co. v. California Mart, 2 Cal. App. 3d 846.)

The appellant, however, seeks to convince this court that he presented evidence which established a prima facie case for the plaintiff. It is apparent that he is seeking to apply a rule of law which would be applicable to a non-suit. This explains the partial reporter's transcript.

Appellant's second point raised by the notice of appeal appears on its face to be groundless and without merit. There is nothing in section 631.8 of the Code of Civil Procedure which can be construed as limiting the power of a judge to grant such a motion simply because he has heard some defense testimony. In this

case, as occurs so often in trial, the court permitted defendant to put a single witness on the stand out of order during plaintiff's presentation of his evidence. This could in no way militate against the subsequent granting of a motion under section 631.8 of the Code of Civil Procedure.

At the time for oral argument on the motion on July 9, 1970, the court indicated a disposition to dismiss the appeal as frivolous. Only appellant Berman appeared in opposition to the motion. The court granted 20 days to appellants to submit supplemental points and authorities on why the court should not dismiss the appeal. Respondent was given 10 days to answer. Only appellant Kramer has filed anything with the court. On July 29, appellant Kramer filed a "Supplemental Opening Brief."

This document does not come to grips with the point raised in the motion nor with the court's view as to the second point on appeal.

The respondents' motion is granted. The remaining portion of the appeal is dismissed on the court's own motion.

The appeal of both Kramer and Berman is dismissed as to all respondents.

APPENDIX B

[Opinion of the Court of Appeal, Second Appellate District, State of California, Division Two, Filed August 28, 1970, Clay Robbins, Jr., Clerk]

2nd Civil No. 36226

DAVID KRAMER and SANFORD H. BERMAN, Plaintiffs and Appellants, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	ORDER CORRECTING ORDER FILED AUGUST 27, 1970

THE COURT:

The order dismissing the appeal filed August 27, 1970, is corrected as follows:

On page 3, line 7, strike "Berman" and in its place insert the name "Kramer."